

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

In re M&T Bank Corporation ERISA Litigation

Civil Action No.: 1:16-cv-375-FPG-JJM

Consolidated Action

**DECLARATION OF KAI H. RICHTER IN SUPPORT OF PLAINTIFFS’
MOTION FOR CLASS CERTIFICATION**

I, Kai H. Richter, declare and state as follows:

1. I am a partner at Nichols Kaster, PLLP (“Nichols Kaster”), and am one of the attorneys representing Plaintiffs in the above-captioned action. I submit this declaration in support of Plaintiffs’ Motion for Class Certification.

Professional Background

2. I am licensed to practice law in the State of Minnesota, and also have been admitted to practice in several federal district courts and appellate courts across the country. A list of jurisdictions and courts in which I have been admitted is set forth below:

Supreme Court of the United States
1st Circuit Court of Appeals
2nd Circuit Court of Appeals
3rd Circuit Court of Appeals
6th Circuit Court of Appeals

8th Circuit Court of Appeals
9th Circuit Court of Appeals
U.S.D.C. for the Eastern District of Michigan
U.S.D.C. Western District of New York
U.S.D.C. for the District of Minnesota
Minnesota Supreme Court

I am in good standing in every jurisdiction in which I have been admitted to practice.

3. I have been actively engaged in the practice of law since 1999 and have substantial class action experience and other complex litigation experience. Since joining Nichols Kaster in April 2010, my practice has focused exclusively on class action cases. The majority of cases I handle are consumer class actions and ERISA class actions. I have been appointed class counsel for litigation or settlement purposes in approximately twenty class cases. In connection with those cases, I have personally negotiated class action settlements providing for more than \$275 million in available relief to class members nationwide

4. In connection with my consumer class action work, I have spearheaded class action litigation against several large financial institutions, including JPMorgan Chase, Bank of America, U.S. Bank, Wells Fargo, Citibank, GMAC Mortgage, RBS Citizens, and MidFirst Bank. For example, I successfully argued contested class certification motions in *Hofstetter v. Chase Home Finance, LLC*, 2011 WL 1225900 (N.D. Cal. Mar. 31, 2011) and *Ellsworth v. U.S. Bank, N.A.*, 2014 WL 2734953 (N.D. Cal. June 13, 2014), successfully argued before the First Circuit Court of Appeals in *Lass v. Bank of America, N.A.*, 695 F.3d 129 (1st Cir. 2012), and successfully argued and/or briefed dispositive motions in numerous other consumer class action cases, including *Jackson v. Wells Fargo Bank, N.A.*, 2013 WL 5945732 (W.D. Pa. Nov. 7, 2013); *Leghorn v. Wells Fargo Bank, N.A.*, 950 F. Supp. 2d 1093 (N.D. Cal. 2013); *Casey v. Citibank, N.A.*, 915 F. Supp. 2d 255 (N.D.N.Y. 2013); *Berger v. Bank of America, N.A.*, 2013 WL 1164497

(D. Mass. Mar. 21, 2013); *Morris v. Wells Fargo Bank, N.A.*, 2012 WL 3929805 (W.D. Pa. Sept. 7, 2012); *Ulbrich v. GMAC Mortgage, LLC*, 2012 WL 3516499 (Aug. 15, 2012); *Walls v. JPMorgan Chase Bank, N.A.*, 2012 WL 3096660 (W.D. Ky. July 30, 2012); *Skansgaard v. Bank of America, N.A.*, 896 F. Supp. 2d 944 (W.D. Wash. 2011); and *Wulf v. Bank of America, N.A.*, 798 F. Supp. 2d 586 (E.D. Pa. June 27, 2011).

5. I am also currently co-leading our firm's ERISA Class Action Team. In addition to the present case, the firm's lawyers (including myself) have been appointed class counsel for litigation and/or settlement purposes in nine other ERISA cases, as set forth below:

- *Brotherston v. Putnam Investments, LLC*, 1:15-cv-13825 (D. Mass.);
- *Andrus v. NY Life Ins. Co.*, 1:16-cv-05698 (S.D.N.Y.);
- *Main v. American Airlines, Inc.*, 3:16-cv-01033 (N.D. Tex.);
- *Bowers v. BB&T Corp.*, 1:15-cv-00732 (M.D.N.C.);
- *Urakhchin v. Allianz Asset Management of America, L.P.*, 8:15-cv-01614 (C.D. Cal.);
- *Johnson v. Fujitsu Tech. & Bus. of America, Inc.*, No. 5:15-cv-03698 (N.D. Cal.);
- *Wildman v. American Century Servs., LLC*, No. 4:16-cv-00737 (W.D. Mo.);
and
- *Clark v. Oasis Outsourcing Holdings Inc.*, No. 9:18-cv-81101 (S.D. Fla.); and,
- *Moreno v. Deutsche Bank American Holding Corp.*, 15-cv-9936 (S.D.N.Y.)

6. Our firm took the *Putnam*¹ and *American Century* cases to trial in April 2017 and September 2018, respectively. We received final court approval of settlements in *Deutsche Bank*, *New York Life*, *American Airlines*, *Fujitsu*, and *Allianz*, and *Oasis*, and also received preliminary approval of the pending settlement in *BB&T*. We won contested class certification motions in *Deutsche Bank*, *BB&T*, *Allianz*, *American Century*, and *Putnam*. We also defeated motions to dismiss in several of these cases in whole or in part (*Putnam*, *American Airlines*, *BB&T*, *Allianz*, *Fujitsu*, *Deutsche Bank*, and *American Century*), as well as in this case and *Velazquez v. Massachusetts Fin. Servs. Co.*, --- F. Supp. 3d ---, 2018 WL 3518499 (D. Mass. July 19, 2018) and *Morin v. Essentia Health*, 2017 WL 4083133 (Sept. 14, 2017), *report and recommendation affirmed*, 2017 WL 4876281 (D. Minn. Oct. 27, 2017).

7. The firm is viewed as a leader in ERISA 401(k) cases. According to a recent Bloomberg BNA article, “Nichols Kaster has been the driving force” behind recent 401(k) self-dealing litigation. *See* Jacklyn Wille, *Deutsche Bank Can’t Shake 401(k) Fee Lawsuit*, Bloomberg BNA (Oct. 17, 2016). Attorneys from Nichols Kaster have been interviewed by National Public Radio (for the program “All Things Considered”), Bloomberg, Financial Times, Investment News, Bankrate.com, and several trade publications in connection with their ERISA work. I also have spoken by invitation at several national conferences and seminars on ERISA litigation, including (1) the Professional Liability Directors & Officers Liability Conference on a panel regarding “Plan Fee Litigation” (on February 6, 2019); (2) the American Bankers Association Insurance Risk Management Conference on a panel concerning excessive fee ERISA class actions (on February 5, 2019); (3) the American Law Institute’s webcast on

¹ Although we did not prevail before the trial court in *Putnam*, we recently obtained a favorable ruling on appeal in *Brotherston v. Putnam Invs., LLC*, --- F.3d ---, 2018 WL 4958829 (1st Cir. 2018).

Excessive Fee Litigation (November 28, 2018); (4) the American Law Institute’s tax-exempt and government plans education series (September 24, 2018), where I co-presented on “The Current State of Fee Litigation and Its Implications”; (5) the American Conference Institute’s National Forum on ERISA Litigation (on both March 1, 2017 and November 2, 2017), where I was a member of the “Fiduciary Investment Litigation Update” panel; and (6) the Retirement Advisor Council’s annual meeting (May 22, 2018), where I was a member of a panel on “The Moving Litigation Frontier”.

8. In addition to my consumer and ERISA class action work (described above), I also litigate certain other types of class action matters. For example:

- a. I have served as co-counsel for the plaintiffs in a consolidated MDL proceeding involving claims by job applicants under the Fair Credit Reporting Act, *see Graham v. Michaels Stores, Inc.*, MDL No. 2615, 2015 WL 1519040 (JPML Apr. 2, 2015), and previously litigated another class action case involving similar claims, *see Singleton v. Domino’s Pizza, LLC*, 2012 WL 245965 (D. Md. Jan. 25, 2012), which resulted in a multi-million dollar settlement that was approved by the court;
- b. I was appointed class counsel in a case involving defective COBRA notices to discharged employees regarding their right to elect continuing health care coverage benefits, which also settled on a nationwide class basis. *See Gilbert v. SunTrust Banks, Inc.*, 9:15-cv-80415 (S.D. Fla.).²

9. Prior to joining Nichols Kaster, I served as the Manager of the Complex Litigation Division of the Office of the Minnesota Attorney General. During my tenure there

² That settlement received final Court approval on July 29, 2016.

(from February 2008 to March 2010), I supervised and handled a large number of complex matters. For example, in June and September of 2009, I co-chaired a three-week trial involving claims for fraudulent sales of annuities and legal plans to over 1,200 Minnesota senior citizens, which ultimately resulted in a favorable judgment from the trial court. In addition, I handled a significant consumer enforcement action against Sprint Nextel relating to wrongfully-imposed contracts and early termination fees, which resulted in a comprehensive settlement in October of 2009.

10. I also had significant prior class action experience in private practice, including two multi-week class action trials: a statewide wage and hour class action against Wal-Mart Stores in Minnesota (tried in 2007) and a landmark class action against the University of Michigan Law School. *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

11. I received my law degree from the University of Minnesota Law School in 1999, and my B.A. from Dartmouth College in 1995.

Law Firm Overview

12. Nichols Kaster has been engaged in the practice of law for over 30 years and is devoted to representing the interests of both consumers and employees. The firm has offices in Minneapolis and San Francisco, and currently employs 32 attorneys and a sizeable staff of paralegals, legal assistants, class action clerks, and information technology professionals. A copy of Nichols Kaster's law firm resume is attached hereto as **Exhibit 1**.

13. Nichols Kaster has extensive class action and collective action experience. The firm has been appointed lead counsel or co-counsel in hundreds of class and collective actions, and has recovered hundreds of millions of dollars for its clients.

14. Nichols Kaster was named one of the top 50 elite trial firms by National Law Journal in September 2014, and also has been ranked as a Best Law Firm by U.S. News and World Report. In addition, Nichols Kaster has received praise from numerous courts for its work.

15. The firm's lawyers have litigated dozens of cases through trial, and have managed discovery in cases involving millions of pages of documents. The firm is also well regarded for its appellate work and recently has been involved in two successful appeals before the United States Supreme Court, *see Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015), and *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011).

16. Based on Nichols Kaster's class action and collective action experience, as well as my personal experience handling class action cases, I believe that Nichols Kaster is well-qualified to represent the putative class members in the present case.

17. In the event that we are appointed class counsel in this case, we will vigorously represent the interests of the class members (as we have done to date), and will devote whatever resources are necessary to prosecute the action to a conclusion. Nichols Kaster already has committed significant resources to the case by, among other things: drafting the initial Complaint and First Amended Complaint, and (with co-counsel) drafting the Consolidated Complaint and proposed First Amended Consolidated Complaint; successfully responding to a motion to dismiss; serving and responding to discovery requests; reviewing Defendants' document production (consisting of over 4,400 pages); serving document subpoenas on three third-parties; taking depositions of defense witnesses; engaging an expert and reviewing his report; and preparing the present motion.

18. I am not aware of any conflicts of interest that would impede our ability to represent the class members.

Exhibits Submitted in Support of Motion

19. Attached hereto are true and correct copies or excerpts of the following documents:

- Exhibit 1:** Nichols Kaster, PLLP firm resume;
- Exhibit 2:** Excerpts from Deposition Exhibit 2;
- Exhibit 3:** Excerpts from 2010 Form 5500 M&T Bank Corporation Retirement Savings Plan (beginning with bates number HABIB0000652);
- Exhibit 4:** Excerpts from 2017 Form 5500 M&T Bank Corporation Retirement Savings Plan (beginning with bates number HABIB0003797);
- Exhibit 5:** Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00002157);
- Exhibit 6:** Deposition Exhibit 4;
- Exhibit 7:** Excerpts from 2005 Registration Statement (beginning with bates number HABIB0003838);
- Exhibit 8:** Excerpts from 2003 Form 5500 (beginning with bates number HABIB0000461);
- Exhibit 9:** Excerpts from 2004 Form 5500 (beginning with bates number HABIB0000484);
- Exhibit 10:** Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00001958);
- Exhibit 11:** Excerpts from the deposition transcript of Stephen Braunscheidel;

- Exhibit 12:** Excerpts from Deposition Exhibit 18;
- Exhibit 13:** Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00002410);
- Exhibit 14:** Committee Minutes of March 9, 2006 (beginning with bates number HABIB0002779);
- Exhibit 15:** Excerpts from Deposition Exhibit 11;
- Exhibit 16:** Excerpts from the transcript of the Deposition of Ann Marie Odrobina;
- Exhibit 17:** Excerpts from 401(K) Mapping Options (beginning with bates number MTB-ERISA-00002626);
- Exhibit 18:** Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00001045);
- Exhibit 19:** Committee Minutes of August 13, 2012 (beginning with bates number MTB-ERISA-00000122);
- Exhibit 20:** Committee Minutes of March 11, 2013 (beginning with bates number MTB-ERISA-00000695);
- Exhibit 21:** Committee Minutes of March 10, 2014 (beginning with bates number MTB-ERISA-00000250);
- Exhibit 22:** Committee Minutes of May 12, 2014 (beginning with bates number MTB-ERISA-00000253);
- Exhibit 23:** Committee Minutes of December 1, 2016 (beginning with bates number MTB-ERISA-00002361);
- Exhibit 24:** Committee Minutes of February 29, 2016 (beginning with bates number MTB-ERISA-00000492);

- Exhibit 25:** Committee Minutes of May 9, 2016 (beginning with bates number MTB-ERISA-00000247);
- Exhibit 26:** Committee Minutes of November 3, 2014 (beginning with bates number MTB-ERISA-00000558);
- Exhibit 27:** Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00000951);
- Exhibit 28:** Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00001275);
- Exhibit 29:** Committee Minutes of May 14, 2012 (beginning with bates number MTB-ERISA-00000556);
- Exhibit 30:** Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00000498);
- Exhibit 31:** Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00000072);
- Exhibit 32:** Committee Minutes of May 13, 2013 (beginning with bates number MTB-ERISA-00000496);
- Exhibit 33:** Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00000749);
- Exhibit 34:** Committee Minutes of August 13, 2013 (beginning with bates number MTB-ERISA-00000621);
- Exhibit 35:** Committee Minutes of November 21, 2013 (beginning with bates number MTB-ERISA-00000429);
- Exhibit 36:** Excerpts from M&T Bank Employee Benefit Plans Committee Materials

(beginning with bates number ERISA-00000627);

Exhibit 37: Committee Minutes of August 31, 2015 (beginning with bates number MTB-ERISA-00000844);

Exhibit 38: Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00001409);

Exhibit 39: Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00000560);

Exhibit 40: Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00000124);

Exhibit 41: Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00001209);

Exhibit 42: Barrons 2013 Rankings (beginning with bates number HABIB0001029);

Exhibit 43: Barrons 2014 Rankings (beginning with bates number HABIB0001047);

Exhibit 44: Excerpts from BrightScope data (beginning with bates number HABIB0001813);

Exhibit 45: Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00001817, designated “Confidential” by Defendants);

Exhibit 46: Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00002450, designated “Confidential” by Defendants);

Exhibit 47: Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00000393); and

Exhibit 48: Excerpts from M&T Bank Employee Benefit Plans Committee Materials (beginning with bates number MTB-ERISA-00002226, designated “Confidential” by Defendants).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 25, 2019

/s/ Kai H. Richter
Kai H. Richter

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2019, a true and correct copy of the Declaration of Kai Richter in Support of Plaintiffs’ Motion for Class Certification, and Exhibits 1 - 44, and 47 thereto, were served by CM/ECF to the parties registered to the Court’s CM/ECF system. Exhibits 45, 46, and 48 were served on all counsel of record via encrypted email, pending the Court’s determination as to whether those exhibits may be filed under seal.

Dated: March 25, 2019

/s/ Kai H. Richter
Kai H. Richter